Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of		
Unbundled Access to Network Elements	)	WC Docket No. 04-313
Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers	)	CC Docket No. 01-338

COMMENTS OF THE PUBLIC UTILITIES COMMISSION OF OHIO

I. INTRODUCTION

The dynamic technological, competitive and economic factors for determining whether competitors' provision of local telephone service would be impaired without a certain UNE are not generally amenable to a singular, conclusive nationwide determination by the FCC. They are largely fact-intensive or specific to a particular geographic region or market. State commissions are well-suited to make determinations based on local market conditions and to make factual findings in a contested adjudicative hearing process. The Public Utilities Commission of Ohio (Ohio Commission) has expended considerable time and resources on its TRO-related proceedings –as have most other State commissions – and should be permitted a reasonable period of time to complete

those proceedings. As discussed below, the Ohio Commission believes that the FCC can easily modify its approach from the *Triennial Review Order* to satisfy the *USTA II* decision without "throwing out the baby with the bath water." Indeed, the D.C. Circuit has provided a clear blueprint for doing so within its opinion.

Consistent with our prior comments in this matter (which are attached and are being submitted again for consideration at this time), the Ohio Commission does not expect that the FCC will be able to make national impairment findings that pass statutory muster based on the scattershot information to be submitted by a few State commissions. The FCC itself has already concluded that the existing record was insufficient and that was the very reason it enlisted the help of State commissions. The FCC should follow the model of Section 271 (long distance authority for RBOCs) where State commissions conduct proceedings and gather information to make findings, for the sole purpose of formulating detailed recommendations to the FCC so it can make the final decision. There is no need to over-react to the *USTA II* decision and cut State commissions completely out of the process, when the FCC reasonably concluded all along that States would need to play a critical role in this process. Although this will take more time up front, it will be more defensible and will actually save time by avoiding another successful litigation challenge if the FCC attempts to make its own findings based on the current record that includes the level of detail required by *USTA I*.

II. DISCUSSION

In the *Triennial Review Order* the FCC already acknowledged its inherent limitations in performing those evaluations, which ultimately resulted in the *USTA I* reversal. Specifically, the FCC acknowledged that State commission review was necessary: "to ensure that the proper degree of unbundling occurs, we rely … on market-by-market fact-finding determinations made by the states." *Triennial Review Order* at ¶ 186. The FCC went on to clarify the necessity of State review as follows:

> The record before us and the D.C. Circuit's emphasis on granularity in making unbundling determinations lead us to conclude that asking states to take on some fact finding responsibilities would be *the most reasonable way to implement the statutory goals* for certain network elements. We find that giving the states this role is most appropriate where, in our judgment, *the record before us does not contain sufficiently granular information* and *the states are better positioned than we are to gather and assess the necessary information*.

Triennial Review Order at ¶ 188 (emphasis added). Thus, the FCC itself has already found that State commission review was necessary because States are better positioned to make granular findings and because the existing record before the FCC was (and remains) insufficient relative to each area delegated for state review by the *Triennial Review Order*.

Indeed, the D.C. Circuit itself has described the *USTA I* decision as requiring "a more nuanced concept of impairment" that tracks relevant market characteristics and captures significant variation among markets. *United States*

Telecom Ass'n. v. FCC, 359 F.3d 554, 563 (D.C. Circuit 2004) ("*USTA II*" further explaining the "*USTA I*" decision). Similarly, in describing the FCC's attempt in the *Triennial Review Order* to satisfy the *USTA I* remand, the D.C. Circuit explicitly recognized that the areas delegated to States were those UNEs "[w]here the Commission believed that the record could not support an absolute national impairment finding but at the same time contained too little information to make 'granular' determinations…" *Id* Thus, with all due respect, the Ohio Commission does not believe the FCC can suddenly conclude that the same record now supports national impairment findings without the need for market-specific evaluations. In any case, even using additional information submitted in this stage of the proceeding, it is an understatement to observe that the FCC will be hard pressed to formulate record-based findings tailored to particular markets that are sufficiently granular –especially for each and every market within the entire country.

Instead, the FCC needs to again rely upon State commissions for input and assistance –this can be done without running afoul of the *USTA II* restrictions on the FCC's ability to delegate its statutory authority concerning unbundling. Even the *USTA II* Court recognized that there are three types of "legitimate outside party input into agency decision-making processes: (1) establishing a reasonable condition for granting federal approval; (2) fact gathering; and (3) advice giving. *USTA II*, 359 F.3d at 566. The *USTA II* Court

also cited federal case authority to support the conclusion that a federal agency may turn to an outside party for advice and policy recommendations, provided the agency makes the final decisions itself. *USTA II*, 359 F.3d at 567. Similarly, the D.C. Circuit noted that the case law did not prevent reliance by a federal agency on a state board for "nondiscretionary activities such as compiling, hearing and transmitting technical information." *Id*. Thus, although the D.C. Circuit concluded that the regulatory scheme set forth in the *Triennial Review Order* was not designed to operate within these legal confines, the FCC can easily modify its approach to satisfy these delegation restrictions.

In response to the *Triennial Review Order*, State commissions, including the Ohio Commission, dedicated extensive time and resources to conducting state-specific TRO proceedings. Based on the litigation challenges and related uncertainty, most states suspended their TRO proceedings pending the outcome of that litigation. It is our understanding that very few State commissions will be in a position to offer impairment findings now or even convey meaningful summaries of the evidence presented in their proceeding –primarily because of the pending status of those proceedings and the extremely short period of time given to respond to the current NPRM. For those reasons and due to unresolved confidentiality concerns,[1] the Ohio Commission is not submitting its record to

[1] It is not clear how States or parties active in State proceedings were supposed to respond to the invitation in ¶ 15 of the NPRM to submit data from State proceedings. Much of the data was considered confidential by the companies originally submitting or producing the data and/or

the FCC and is not in a position to characterize the evidence in our pending proceedings. But the Ohio Commission, as with most State commissions, has conducted several proceedings in response to the *Triennial Review Order*. And we can offer a procedural summary of our progress to date concerning the five proceedings in response to the FCC's August 21, 2003 TRO decision.

***In the Matter of the Implementation of the Federal Communication Commission's Triennial Review Regarding Local Circuit Switching in the Mass Market*, Case No. 03-2040-TP-COI**

This proceeding was initially divided into two general phases, the geographic market definition phase and the impairment phase. An evidentiary hearing was conducted for the market definition phase. The Ohio Commission did make a tentative finding as to how to define the geographic markets for purposes of performing an impairment analysis. The impairment phase was later broken into two separate proceedings (listed below) for SBC and Cincinnati Bell.

On October 2, 2003, the Ohio Commission issued an Order for the purpose of allowing ILECs to examine the impairment issues relative to the unbundled local circuit switching for mass market customers in Ohio. The Ohio Commission limited the proceeding to the four largest ILECs in the State of Ohio (who serve

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was submitted involuntarily by companies that were not active parties in the proceeding. Absent particularized determinations under State law relative to that extensive set of data (which was not previously due to the suspension of the cases and because of the substantial resources required to reach those determinations), it is not clear how a State commission could take such data submitted for purposes of the State proceeding and unilaterally send it off to the FCC for review by an entirely different set of parties and regulators, absent making those detailed findings or obtaining consent of all affected parties. Undertaking such an arduous task was not particularly feasible within the short comment period allowed in this case.

on an aggregate 92 percent of the State's access lines as of December 21, 2001): SBC Ohio, Verizon North, Cincinnati Bell, and United Telephone Company of Ohio dba Sprint. The Ohio Commission required that any of these ILECs seeking to challenge the FCC's finding of impairment relative to mass market local switching to specify the central offices for which the impairment challenge is being made and to do so by October 17, 2003. The Commission added that ILECs electing not to challenge the FCC's finding of impairment relative to mass market local switching by October 17, 2003 shall remain subject to the status quo and must continue to offer unbundled local switching and unbundled network element-platform (UNE-P) to mass customers until the Ohio Commission subsequently review mass market switching impairment issues relative to that company in a subsequent phase of the proceeding.

On October 17, 2003 only SBC Ohio and Cincinnati Bell filed their applications to challenge the FCC's impairment finding for local switching for mass market. Subsequently, the Ohio Commission scheduled a hearing on December 9, 2003 for the purpose of tentatively defining the appropriate geographic market(s) for the analysis of the mass market local switching impairment as the first phase of the proceeding. The Ohio Commission also tentatively adopted the FCC's cutoff for multi-line DS0 customers to be included as mass market customer.

Based on the hearing record, on January 14, 2004, the Ohio Commission issued its decision and tentatively defined the geographic markets for SBC Ohio and Cincinnati Bell for the purpose of mass market local switching impairment analysis. The Ohio Commission found that grouping contiguous wire centers on the basis of the Commission-established UNE-loop rate zones within each MSA as separate geographic markets satisfies all the criteria set forth in 47 CFR 51.319(d)(2)(i) and ¶¶495-496 of the *Triennial Review Order*. Specifically, the geographic area served by the ILEC within each of the MSAs at issue in this proceeding (Akron, Cleveland-Elyria-Mentor, Cincinnati, Columbus, Dayton and Toledo) shall be divided into separate markets according to the Commission-established UNE-loop rate zones. Each market will include the cluster of contiguous wire centers grouped by UNE-loop rate zone. Non-contiguous wire centers in each UNE-loop rate zone shall be identified as separate markets.

This tentative conclusion produced twenty-three (23) geographic markets for SBC Ohio and seven (7) geographic markets for Cincinnati Bell. The Ohio Commission stated that its tentatively defined geographic markets must be used by all parties in the next phase of the proceeding to perform the impairment analysis. Additionally, parties may present alternative impairment analysis based on their proposed alternative markets in the next phase of the proceeding. The Ohio Commission also granted SBC Ohio and Cincinnati Bell an opportunity

(by January 21, 2004) to add to, or delete from their respective list of wire centers that they intend to challenge for the purpose of the impairment analysis.

On January 21, 2004, Cincinnati Bell filed a revised list of wire centers for which it is seeking a finding of no impairment for mass market local switching that limit its challenge to markets 1, 2, 3, and 4 of the seven markets identified by the Ohio Commission. The impairment analysis for mass market local switching was bifurcated with respect to SBC Ohio and Cincinnati Bell. SBC Ohio's mass market impairment analysis, including the examination of its batch hot cut process, to be conducted pursuant to Case No. 04-34-TP-COI. Cincinnati Bell's mass market impairment analysis, including the examination of its batch hot cut process, to be conducted pursuant to Case No. 04-35-TP-COI.

On January 21, 2004, Cincinnati Bell filed a revised list of wire centers for which it is seeking a finding of no impairment for mass market local switching that limit its challenge to markets 1, 2, 3, and 4 of the seven markets identified by the Ohio Commission. The impairment analysis for mass market local switching in Cincinnati Bell geographic markets was scheduled to begin on March 15, 2004 for those four markets with Cincinnati Bell's testimony to be filed on February 3, 2004 and interveners' testimony to be filed on February 26, 2004. All testimonies were filed as ordered by the Ohio Commission, but the proceeding was held in abeyance until further notice on March 3, 2003.

With respect to SBC Ohio, the company did not file any revisions to the wire center lists. The impairment analysis for mass market local switching in SBC Ohio geographic markets was scheduled to begin on March 29, 2004 for those twenty-three markets with SBC Ohio's testimony to be filed on February 10, 2004 and interveners' testimony to be filed on March 9, 2004. SBC Ohio's testimonies were filed as ordered by the Ohio Commission, but the proceeding was held in abeyance until further notice on March 3, 2003.

Relative to the Hot Cut issue, the Ohio Commission conducted a separate set of activities in its 03-2040 docket. On October 2, 2003, the Ohio Commission issued an Entry directing all parties to work collaboratively with the Commission staff for the purpose of discussing the need for the establishment of a batch hot cut process. On October 15, 2003, the Ohio Commission issued an Entry directing all large ILECs in Ohio that wish to challenge the FCC's finding of impairments for mass market switching to state their opinions by October 23, 2003, as to whether a batch hot cut process in certain portions or all of their Ohio service areas are necessary. The Commission further ordered any intervening party objecting to the ILEC's contention to file its objections by October 30, 2003. SBC-Ohio and CBT were the only two large ILECs in Ohio that intended to challenge the FCC's finding of switching impairment in the mass market.

On October 22, 2003, the Ohio Commission issued an Entry scheduling an SBC "batch hot cut" collaborative meeting in Columbus, Ohio, on November 5,

and 6, 2003. Additionally, the Commission appointed Mr. John Kern, Kern & Associates, to be the facilitator of the batch hot cut process in Ohio. On October 28, 2003, the Commission issued an Entry directing the batch hot cut collaborative to conclude its efforts by mid-December 2003, and to file a joint status report by January 6, 2003. The collaborative was also instructed by the Commission to clearly identify in its joint status report all components of the batch hot cut process where there is agreement and all issues that remain in dispute. The Commission also scheduled a hearing relative to SBC-Ohio's batch hot cut process during the week of March 7, 2004.

On November 13, 2003, the Commission issued an Entry stating that based on all arguments raised by CBT and the interveners, the Commission concluded that the analysis of CBT's batch hot cut process should be consolidated with the Commission's analysis of switching impairment in CBT's mass market. The CBT mass market/batch hot cut process hearing was scheduled for the week of March 15, 2004. During the months of January and February, 2004, direct testimonies related to the batch hot cut process were filed by SBC, CBT, and all interveners in dockets 03-2040-TP-COI, 04-34-TP-COI, and 04-35-TP-COI. On March 3, 2004, prior to any of the batch hot cut hearings, all open Ohio TRO proceedings were placed in abeyance by the Ohio Commission.

***In the Matter of the Implementation of the Federal Communication Commission's Triennial Review Regarding High Capacity Loops and Dedicated Transport*, Case No. 03-2041-TP-COI**

On October 2, 2003, the Ohio Commission issued an Order, in Case No. 03-2041-TP-COI, for the purpose of allowing incumbent local exchange companies (ILECs) to challenge the FCC's finding that, on a national basis, competitors are impaired without access to specific types of high capacity loops and dedicated transport.[2] The Ohio Commission required that any ILEC seeking to challenge the FCC's finding of impairment file a petition by November 3, 2003. In absence of such a petition, the Ohio Commission found that the case should be closed of record as of November 4, 2003.

On November 3, 2003, SBC Ohio was the only ILEC that filed a petition challenging the FCC's national finding of impairment relative to high capacity loops and transport. The Ohio Commission then issued an Entry in this case on November 6, 2003. This Entry set forth a managed discovery process, set a deadline for intervention and tentatively scheduled a hearing to commence the week of February 23, 2004.

Responses to the Ohio Commission's managed discovery requests were required from SBC Ohio, other designated ILECs and non-ILEC telephone companies. The responses were specific to the loop and transport routes provided in SBC Ohio's November 3, 2003 application and were provided to the staff of the Commission, in both electronic and hard-copy format, on or before

December 2, 2003. Some responses were received after that date for various reasons. All responses to the Commission and between the parties were provided pursuant to an executed protective agreement.

In preparation for the hearing, SBC Ohio filed its testimony in support of its petition on January 5, 2004, with other parties' testimony filed on February 2, 2004 as supplemented on February 17, 2004. An evidentiary hearing in this matter was held at the offices of the Ohio Commission commencing on February 23, 2004 and concluding on February 25, 2004. On March 3, 2004, prior to the filing of post-hearing briefs, this case along with the other Ohio TRO proceedings was placed in abeyance by the Ohio Commission.

***In the Matter of the Implementation of the Federal Communication Commission's Triennial Review Regarding Local Circuit Switching for DS1 Enterprise Customers*, Case No. 03-2042-TP-COI**

On October 2, 2003, the Ohio Commission issued an Order, in Case No. 03-2042-TP-COI, for the purpose of allowing CLECs to challenge the FCC's national presumption of no impairment to local circuit switching for DS1 enterprise customers. The Ohio Commission concluded that based on the very limited demand exhibited in the state of Ohio (based on a commission staff inquires of Ohio's CLECs) for packages of high capacity loops combined with unbundled local switching from the ILEC, the commission shall not, on its own

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[2] The FCC found that the following types of high-capacity loops are impaired: dark fiber, DS3 and DS1. The FCC also found that the following types of dedicated transport are impaired: dark fiber, DS3 and DS1. *See Triennial Review Order* at ¶¶314, 321, 327, and 359.

accord, initiate a proceeding to investigate whether to challenge the FCC's national presumption of no impairment.

The Ohio Commission required any CLEC seeking to challenge the FCC's national presumption of no impairment to file a petition in this docket by no later than October 17, 2003, establishing a *prima facie* case sufficient to overcome the FCC's national presumption of no impairment. The Ohio Commission stated that in the absence of a CLEC petition filed by October 17, 2003, the case will be closed of record as of October 18, 2003. No CLEC filed petition by the Ohio Commission –established time frame, and the case was closed of record as of October 18, 2003.

***In the Matter of the Implementation of the Federal Communication Commission's Triennial Review Regarding Local Circuit Switching in SBC Ohio's Mass Market*, Case No. 04-34-TP-COI**

Information, testimony and arguments were submitted by the parties in this proceeding, but no evidentiary hearing was conducted relative to the impairment phase of this case and the proceeding was held in abeyance.

***In the Matter of the Implementation of the Federal Communication Commission's Triennial Review Regarding Local Circuit Switching in Cincinnati Bell's Mass Market*, Case No. 04-35-TP-COI**

Information, testimony and arguments were submitted by the parties in this proceeding, but no evidentiary hearing was conducted relative to the impairment phase of this case and the proceeding was held in abeyance.

Although the above summaries demonstrate the complexity of issues presented and the considerable time and resources expended by the Ohio Commission, that information does not give the FCC enough information to make impairment findings applicable to Ohio that satisfy the *USTA* decisions. Likewise, even if a handful of States do submit more information and/or even findings made for particular UNEs, that is not a sufficient basis for the FCC to resolve national findings for all States that satisfy the rigors of Section 251 and the *USTA* decisions. Rather, the Ohio Commission believes that the FCC should again establish the initial UNE list and delegate to States the role of recommending modifications of the UNE list in a particular State. But this time, the FCC would have the final word on modifications to the default UNE list.

Using Section 271 of the 1996 Act as a model, the FCC could set up a process whereby the State commissions have a limited (but reasonable) period of time to conduct proceedings for the purpose of making a recommendation to the FCC regarding modification of the default UNE list. This would allow the FCC to make decisions based on market-specific and record-based information as evaluated by State commissions. The FCC could also select a subset of UNEs and provide that specific factual findings be made to determine the result in a specific market, consistent with the *USTA II* parameters.

Similar to the detailed TELRIC methodology that was developed by the FCC and applied by State commissions, the FCC's guidelines regarding

modification of the standard UNE list would be applied by State commissions – only this time States would recommend a particular result in a particular State that would be subject to approval by the FCC itself. This approach would be consistent with the structure and purpose of the 1996 Act, while reconciling the subtending mandates of *USTA I* and *USTA II*. As discussed above, the *USTA II* opinion expressly endorses that kind of input from States as being lawful and permissible. Thus, the Ohio Commission proposes that the FCC's interim list of UNEs be made available by incumbent LECs, absent any modification resulting from the fact-intensive recommendations of State commissions (if adopted by the FCC) regarding whether to add or subtract a particular UNE in a particular market given certain conditions.

If the FCC believes that certain UNEs should not be subjected to a recommendation by the State commissions for removal by the FCC, it could designate those as "core UNEs" that would be part of the default list but would not be subject to removal. For example, if the FCC remains firmly convinced that the absence of loops as a mass market UNE would always impair CLECs' ability to effectively compete for the foreseeable future, the FCC could designate loops as a core UNE. This approach would guarantee that certain UNE(s) would be available on a national basis until further review by the FCC, while recognizing that application of the same impairment test to other UNEs may result in State commissions recommending different outcomes based on varying local market

conditions. As was previously acknowledged by the FCC (discussed above) and which contributed in the *USTA I* reversal, the FCC is not equipped to make the required market-specific evaluations of UNE impairment necessary to satisfy Section 251. Rather than going "full circle" back to a superficial set of impairment findings made by the FCC that could be easily challenged in Court, the FCC should combine the lessons of *USTA I* and *USTA II* by allowing for meaningful input and advice from States while reserving final judgment to itself.

This approach will take some time up front, but it is more likely to save time in the long run by reducing the chances of yet another reversal of the FCC's new impairment analysis. A "rush" to judgment after eight years of trying to satisfy legal muster under Section 251 is not likely to be a successful strategy. If the FCC needs to make provisional or interim findings while State proceedings to develop input and recommendations are pending, that would be far more effective that putting together "final" rules that will again be reversed, thereby causing years of additional delay and uncertainty in the telecom industry. In philosophical terms, "a stitch in time saves nine" and the FCC should take the necessary time to develop a defensible approach that will properly evaluate and balance the competing interests involved. The current timetable being sought by the FCC simply fails to allow for meaningful input by States and is doomed to failure.

Regarding the framework for impairment evaluation to be done by the FCC to establish the national default set of UNEs, the Ohio Commission submits that the FCC should again utilize the same basic factors discussed in the *Triennial Review Order* to formulate a set of guidelines/standards that could be followed by State commissions. Of the primary factors used, the Ohio Commission continues to believe the most important factors are the availability and cost of UNE-type services provided by non-incumbent LEC sources (including the requesting carrier's self-provision of UNEs). The Ohio Commission also continues to believe that an important consideration in designating UNEs should be whether facilities-based competition is promoted. The most prevalent debate in this regard relates to availability of the UNE-P, which only remains available if all of the underlying UNEs remain available (*i.e.*, unbundled loops, switches, and transport elements).

The Ohio Commission has faithfully implemented the UNE-P as structured in the *UNE Remand Order.* The Ohio Commission has established wholesale rates for SBC Ohio, using the TELRIC methodology, that have consistently been ranked among the very lowest in the entire country. Although there has been some mass market participation by CLECs using the UNE-P in Ohio, it has fluctuated and has not proven to be a sustainable long-term market strategy. So even if it is maintained on a temporary basis, the Ohio Commission continues to believe that the UNE-P should not be significantly relied upon to

achieve sustainable competition in the long term. Indeed, the Ohio Commission believes that the UNE-P can only be used as a temporary or transitional market entry strategy —it is not a viable long-term solution for facilities-based local competition.

The Ohio Commission was among the few non-industry parties (and ostensibly the only State commission) that advocated as early as the *UNE Remand* proceeding for elimination of the switch as a UNE, which would have eliminated the UNE-P by implication. *UNE Remand*, Ohio Comments at 7-9. And the FCC did limit the availability of local switching as a UNE in the densest areas of the largest markets for customers having more than four lines. *UNE Remand Order*, 15 FCC Rcd. at 3822-3831. Thus, the UNE-P is already unavailable in those circumstances (and EELs were provided in place of unbundled local switching).

The Ohio Commission's position is premised on promoting real development of local markets and long-term facilities-based competition, in an economically rational manner. This type of approach avoids encouraging unsustainable competition, while recognizing that interim approaches are necessary and appropriate to facilitate market entry. Given that these issues are now being re-examined eight years after passage of the 1996 Act, the FCC should be establishing long term policies that are no longer geared toward temporary, short-term competitive strategies.

CONCLUSION

The Ohio Commission wishes to thank the FCC for the opportunity to file comments in this proceeding.

Respectfully submitted,

ON BEHALF OF THE PUBLIC UTILITIES COMMISSION OF OHIO

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